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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 838

UNITED STATES OF AMERICA, PETITIONER

v.

ERNESTINA G. FLEISCHMAN

No. 839

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN R. BRYAN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit (F. R. 314-315; B. R. 72)[1] reversing respondents' convictions in the United States District Court for

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[1] The records in the *Fleischman* and *Bryan* cases will be designated by the letters F. and B., respectively.

the District of Columbia on charges of wilfully making default before a Committee of the House of Representatives.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (F. R. 305-314; B. R. 71) are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered April 8, 1949 (F. R. 314-315; B. R. 72). The time within which to petition for writs of certiorari was extended to June 6, 1949, by Mr. Chief Justice Vinson. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the lack of a quorum of a congressional committee on the return of a subpoena to produce records constitutes a defense to a charge of wilful default, where objection to the production of the records is not made on that ground.

STATUTE INVOLVED

Revised Statutes, § 102, as amended, 52 Stat. 942, 2 U. S. C. 192, provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee estab-

lished by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

Ernestina G. Fleischman, a member of the executive board, and Helen R. Bryan, executive secretary of the Joint Anti-Fascist Refugee Committee, were charged in separate indictments filed in the United States District Court for the District of Columbia with wilfully making default, in violation of R. S. § 102, by failing to produce records before a congressional committee in accordance with the summons of that committee (F. R. 5; B. R. 1-2). The indictments alleged that respondents were summoned to produce before the House Committee on Un-American Activities certain records of the Joint Anti-Fascist Refugee Committee; that they appeared before the Committee on April 4, 1946; that Mrs. Fleischman failed to produce the records, as she had power to do, and that Miss Bryan refused to produce the records; and that they thereby wilfully committed a default (F. R. 5; B. R. 2). Mrs. Fleischman had been jointly in-

dicted[2] with the petitioners in *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843 (petition for rehearing pending), but was tried separately.[3]

On March 29, 1946, after the failure of two previous attempts to obtain records of the Joint Anti-Fascist Refugee Committee from Barsky, the chairman of the executive board, and Miss Bryan, executive secretary (F. R. 109), the Committee on Un-American Activities issued a subpoena to each of the 17 members of the executive board, including Mrs. Fleischman, and another subpoena directed to the organization by name, calling upon each of them to appear on April 4, 1946, to testify and to produce the organization's books and records relating to the receipt and disbursement of money and correspondence with persons in foreign countries during the preceding 15 months (F. R. 97; B. R. 31). The subpoena directed to Mrs. Fleischman was served upon her (F. R. 80), and the subpoena directed to the organization by name was

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[2] The indictment against Mrs. Fleischman and her co-defendants consisted of two counts but the trial court directed a judgment of acquittal on the first count, which charged a conspiracy to defraud the United States and to commit an offense against the United States by depriving a congressional committee of records called for in subpoenas issued by the committee (F.R. 3-4, 9).

[3] The evidence on which the Government relied in the *Barsky* case to prove the pertinency of the records which the congressional committee subpoenaed was by stipulation admitted for the same purpose in the trials of respondents (F.R. 151-155; B.R. 24, 51). This evidence, which is summarized in our brief in opposition in the *Barsky* case (O.T. 1947, No. 766), is not material here.

served upon Miss Bryan, who accepted service in her capacity as executive secretary (B. R. 37). Mrs. Fleischman appeared before the Committee on April 4, 1946, stated that she was there in response to the subpoena, but declined to produce the records on the ground (which she read from a statement which was identical with those read by the other members of the executive board) that Miss Bryan had possession of them (F. R. 124-125). Miss Bryan likewise appeared on April 4, 1946, and admitted that she was the custodian of the records, but refused to produce them on the ground that the subpoena was "not valid" (B. R. 46). She also stated that she was uncertain whether she would produce the records even if the executive board of the organization should so direct her (B. R. 44). Respondents and all the members of the executive board were cited by the House for contempt of the Committee.

At the separate trials of respondents, a government witness testified in substance that he was unable to recall the particular members of the Committee on Un-American Activities who were present at the precise moments when respondents appeared since members left the hearing room sporadically, but he had a general recollection that at least a majority of the nine members were in attendance at all times during the day (F. R. 144, 147; B. R. 47-49, 50). The printed transcript of the Committee's proceedings on April 4, 1946,

showed that at least six different members of the Committee addressed questions to the several witnesses on that occasion, five members to Mrs. Fleischman (F. R. 125-127), and four to Miss Bryan (B. R. 35, 36, 46).

The trial court instructed the jury in each case "as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance" (F. R. 283; B. R. 59-60). In the *Fleischman* case, the court also instructed the jury "that the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation" (F. R. 283). In the *Bryan* case, the court advised counsel that he held as a matter of law that a quorum was present when the defendant appeared before the committee (B. R. 62).

No evidence was offered in behalf of respondents (F. R. 279; B. R. 54-55). They were convicted of having wilfully defaulted and each was sentenced to imprisonment for three months and fined $500 (F. R. 7; B. R. 19).

The Court of Appeals, one judge dissenting, reversed each judgment solely on the ground that the instruction that a quorum was present invaded the province of the jury and was reversible error. The court stated that the question whether five mem-

bers, constituting a quorum of the Committee, were or were not present was a material question of fact in dispute which should have been left to the determination of the jury. The dissenting judge considered the presence of a quorum immaterial to the issue of wilful default, since respondents did not assert that their noncompliance with the subpoenas was due to the absence of a quorum of the Committee at the time and place designated in the subpoenas. In his opinion, proof of the presence of a quorum is not an essential element of a *prima facie* case of wilful default.[4]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred—

1. In holding that lack of a quorum of a congressional committee on the return of a subpoena *duces tecum* constitutes a defense to a charge of wilful default in failing to comply with the subpoena, notwithstanding that no suggestion that a quorum was lacking was made at the hearing and no contention was advanced at any time that noncompliance with the subpoena was due to lack of a quorum.

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[4] Another asserted error which was considered on the *Fleischman* appeal was whether the trial court should have directed an acquittal for failure of proof that Mrs. Fleischman was responsible for the nonproduction of the records. On this point also the Court of Appeals divided, but the majority held that the evidence was sufficient to support her conviction. The court did not consider other contentions which were identical with those raised in the *Barsky* case, or the question whether government employees should have been excluded from the jury.

2. In holding that the presence or absence of a quorum was a material factual issue which should have been left to the jury.

3. In reversing the judgments of conviction.

REASONS FOR GRANTING THE WRIT

The effect of the decision below is to require a congressional committee which has duly issued a subpoena *duces tecum* to go through the futile and time-consuming gesture of holding a formal meeting at the time specified in the subpoena even though the person who has been subpoenaed unqualifiedly declares that he will not honor the subpoena regardless of the composition of the committee or even if he does not appear at all. If the meeting is not held, according to the court below, the sanction prescribed by R. S. § 102 for contempt of Congress cannot be invoked. In our view, the orderly and efficient dispatch of congressional business militates against that result, at least unless it is coupled with a condition that the person subpoenaed make known that he objects to the production of the records on the ground that a competent committee is not present to receive them. The problem involves a novel and important aspect of congressional committee procedure which should be settled by this Court.

In *Blair* v. *United States,* 250 U. S. 273, 282, this Court stated that a witness before a court or grand jury "* * * is not entitled to challenge the authority of the court or the grand jury, provided

they have a *de facto* existence and organization." When members of Congress purport to function as a committee to receive records called for by a subpoena which has been duly issued by the authority of a House of Congress, it would seem inconsistent with the principle of the *Blair* decision to permit the person subpoenaed to flout the summons on the ground that the committee was incompetent, without even expressing a challenge on that ground. We think it was incumbent upon respondents, by making known their opposition to testifying and producing records before less than a majority of the Committee, to have afforded an opportunity for absent members to be summoned so as to meet that objection. The tendency and effect of respondents' conduct was not one whit different whether four or five members of the Committee were present at the precise moment of their appearance; in either case their refusal to produce the records deprived Congress of pertinent information in aid of its legislative function. Indeed, to the extent that the subpoena seeks merely the production of documents, it is not a subpoena to testify at all (cf. *Wilson* v. *United States,* 221 U. S. 361), and the presence or absence of a quorum is a wholly irrelevant consideration in relation to the failure to produce the documents. The demand for the documents could be satisfied merely by turning them over to the clerk of the committee, regardless of whether the committee was in fact sitting at the moment. The

gist of the indictment was the refusal to produce the documents at any time.

Respondents were duly served with subpoenas and, although they had the benefit of advice of counsel prior to the hearing (F. R. 251; B. R. 39, 43), at no time was any suggestion made by them, by any other witnesses, or by their counsel that a quorum was not present. Neither did any member of the Committee suggest the lack of a quorum. The default of respondents and the other witnesses was reported to the House of Representatives in due course and citations for contempt issued. It was not until their trials, two years later, that respondents sought to raise the point that a quorum of the Committee had not been present. It has been held in similar circumstances that although a person served with a subpoena may have an excuse for not obeying it, he cannot safely remain silent but must communicate his excuse to the tribunal. Thus in *Carman* v. *Emerson,* 71 Fed. 264, 267 (C. A. 8), the court said:

> * * * It is a contempt of court for a witness who is duly served with a subpoena to appear and testify to treat the command of the court with silent contempt, and neither appear nor take any means of bringing to the attention of the court the existence of facts which would excuse him from attending. The service of the writ of subpoena imposes upon a witness the duty of treating the process of the court with decent respect, and of either attending the court in person or causing to be

> brought to the attention of the court the facts which in law will excuse him from attending. If he does not do this, he justly subjects himself to an attachment which is not necessarily purged by simply showing that his employment was such as exempted him from attending court as a witness, or that he was not subject to be subpoenaed because of the distance he resided from the place where the court was held. * * * If he has a good answer to the exigencies of the writ, he must bring it to the attention of the court in apt time and manner on pain of being treated precisely as though he had no defense whatever.

This doctrine is equally applicable in a situation where, as here, a witness refuses to comply with a subpoena on one ground and later asserts an entirely different one for his noncompliance. It has been held that where the copy of a subpoena which was served upon a witness contained a discrepancy in the return date from that contained in the original subpoena, the error afforded no defense to contempt proceedings against him for failure to appear since he did not appear at either time but based his refusal on other grounds. *Leber v. United States,* 170 Fed. 881, 888 (C. A. 9). Similarly, it is a familiar principle that objections of a witness to a subpoena because of exemption from service are waived unless raised on the return day. *In re Hall,* 296 Fed. 780 (S.D. N.Y.), appeal dismissed, 2 F. 2d 1016 (C.A. 2)).

If we are right in these views, it follows that respondents were in no wise prejudiced by the challenged instruction since there is no question that they made no objection before the committee that a quorum was lacking.[5]

CONCLUSION

It is respectfully submitted that a question of importance which has not been, but should be, decided by this Court is involved, and, therefore, this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1949.

[5] The issues herein are somewhat related to *Christoffel* v. *United States*, No. 528, this Term, which, however, involves false testimony actually given, and arises under a statute making it an offense to testify falsely "before a competent tribunal." Moreover, in the *Christoffel* case, we think the record supports the conclusion that a quorum was present within the meaning of the applicable statute.

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